80-1571

Office-Supreme Court, U.S.
FILED
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 1571

In the Supreme Court of the United States

October Term, 1980

EASTERN ASSOCIATED COAL CORP.,

Plaintiff-Petitioner,

v.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO., LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.,

Defendants-Respondents.

Reply Brief To Respondents' Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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I. THE COURT OF APPEALS FAILED TO ACCORD PROPER WEIGHT TO THE DISTRICT COURT'S DETERMINATION OF PENNSYLVANIA LAW

Defendant-Respondent Insurers ("Insurers") at page 2 of their brief claim that the District Court held that, "The issue of coverage was a question for the jury" and that, the District Court "...submitted all questions of coverage to the jury." when that is not the fact. The Insurers have not specified a record reference in support of their statements because the record is to the contrary. In the District Court's post-trial opinion beginning at the bottom of page B-6*, the Court stated:

> "As is noted, this case is really not a controversy over liability but rather a controversy over the amount of plaintiff's damages and it was held this amount had to be determined by the jury".

The District Court went on to state at B-10:

> "It was further pointed out that the question before the jury was whether they believed plaintiff's testimony and they could find that the purchases were not necessary or the prices alleged were not correct. But if they found that they were, they would be entitled to consider this as covered by the policy, ..."

And, at B-11:

> "...The jury was clearly instructed that if they believed plaintiff's testimony in this respect, they would be entitled to consider these losses on purchases of brokerage coal and substitute coal as covered by the policy. ..."

Thus, it is believed appropriate to note that important statements of the Insurers in opposition to the Petition are contrary to the record.

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*References are to the Appendices to Eastern's Petition for Writ of *Certiorari*.

As the District Court indicated (B-8), its submission to the jury was in accord with *Nusbaum v. Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926), and that decision has not been overruled or distinguished by a Pennsylvania appellate court.

In reviewing the District Court's determination of the law of Pennsylvania, the Court of Appeals was duty-bound to give that determination great weight and not to adopt a contrary view unless convinced of error. *Rios v. Cessna Financial Corporation*, 488 F.2d 25 (10th Cir. 1973); *McCallister v. M-A-C Finance Co. of Tulsa, Inc.*, 332 F.2d 633 (10th Cir. 1964); *Weiser v. Otter Tail Power Co.*, 318 F.2d 375 (8th Cir. 1963); *Illinois Central Railroad Company v. Stufflebean*, 270 F.2d 801 (8th Cir. 1959); *Citrigno v. Williams*, 255 F.2d 675 (9th Cir. 1958); *Frank B. Connet Lumber Co. v. New Amsterdam Cas. Co.*, 236 F.2d 117 (8th Cir. 1956); *Madison County Farmers' Asso. v. American Employers' Inc. Co.*, 209 F.2d 581 (8th Cir. 1954).

Even in situations where the state's law is unsettled, the Court of Appeals should uphold the District Court's determination if that court reached a *permissible conclusion. Western Casualty & Surety Co. v. Herman*, 318 F.2d 50 (8th Cir. 1963); *Weiser v. Otter Tail Power Co., supra.*

Thus, it is only in very limited circumstances that the Court of Appeals should substitute its opinion for the determination of the District Court.

Here, the Court of Appeals failed to concede the respect due the District Court's determination of Pennsylvania law and that the District Court's determination was correct is clearly supported by *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 422 A.2d 1078 (Pa. Super. 1980), which came down four days prior to the reversal of the District Court by the Court of Appeals. The Insurers contend that the "issues in *Berkeley* were entirely different" (p. 5) and that "*Berkeley* involved no claim for any contract expense and no question that otherwise

bears any relationship to the issue presented by this case" (p. 5), but the decision is to the contrary.

The issue in *Berkeley* was exactly the same as here—what loss, if any, did the business sustain? The Pennsylvania Superior Court's reference to the evidence beginning at D-5, continuing in D-6, refutes the Insurers' argument that the case bears no relationship. The admissible evidence recited by the Superior Court and the conclusions are not limited by the policy formula, but to the contrary, the evidence of every aspect of the business operations are admissible and go to the basic issue of what loss, if any, did the business sustain, taking *all* things into consideration. This is the same as Eastern. This is in keeping with the basic principle that such policies are intended to return to the insured the amount of profit it would have earned had the event insured against not intervened.

The only conclusion that can fairly be drawn from *Berkeley* is the application of *Nusbaum,* that the theories of business damage of the two parties are submitted to the jury and from those theories and the evidence, damages are determined. Moreover, *Berkeley* follows the decision in Eastern, contrary to the contention of the Insurers.

Here, the Court of Appeals invaded the province of the jury and deprived Eastern of its right to a jury trial by constituting itself an expert witness as to what *damages* Eastern sustained. The Court of Appeals reached this result by declaring that the policy was unambiguous and that, since the Court of Appeals could not find precise language in the policy supporting Eastern's theory of damages, it would not permit the award of damages even though the policy contained no exclusion of those items. Subconsciously or otherwise, in reality, the Court of Appeals constituted itself an expert witness for the Insurers to espouse the Insurers' theory that Eastern had not sustained a business loss from the fire and the Court of Appeals resolved a purely factual issue properly for the jury.

But without regard to whether the Court of Appeals was correct in its conclusion that the insurance policy is clear and unambiguous (with which another court has disagreed*), the Court of Appeals ignored the holding of the Pennsylvania Supreme Court in *Brakeman v. Potomac Insurance Co.*, 472 Pa. 66, 72, 371 A.2d 193 (1977) that even in such cases there is much more to consider. In the *Brakeman* case, the Pennsylvania Supreme Court overturned its longstanding prior decisions and established as a basic principle of Pennsylvania insurance law that even clear and unambiguous language in an insurance policy is not controlling—a matter which the Court of Appeals refused to consider.

Thus, the Court of Appeals is incorrect on all grounds and the decision tainted with a clear anti-consumer attitude repudiated by the Supreme Court of Pennsylvania. In *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied,* 439 U.S. 1089 (1979), the Supreme Court stated:

> "Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled. Thus, *regardless of the ambiguity, or lack thereof,* inherent in a given set of insurance documents (whether they be applications, conditional receipts, riders, policies, or whatever), the public has a right to expect that they will receive something of comparable value in return for the premium paid." (Emphasis added.) 479 Pa. at 594.

Collister confirms the correctness of the District Court's determination as cited and applied by the Pennsylvania Superior Court in *Berkeley* that the basic principle is that insurance policies are intended to return to the insured compensation for the loss resulting from the event insured against, in this case, necessary expenses and loss of profits.

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*In *Supermarkets Operating Co. v. Arkwright Mutual Insurance Co.*, 257 F. Supp. 273, 276 (E.D. Pa. 1966), examining the same policy the Court stated; "[a]nd an examination of the policy indicates that there is an ambiguity ...."

The cases cited by the Insurers under II, at pages 8, 9 are either before *Brakeman* and *Collister* or readily distinguishable. Not one involves a business interruption policy loss and not one is contrary to *Brakeman* and *Collister* that even clear and unambiguous policies need not be enforced.

II. SPECIAL AND IMPORTANT REASONS FOR REVIEW ARE PRESENT

The Insurers imply that the Court of Appeals considered Eastern's Petition for Reconsideration of Petition for Rehearing With Suggestion for Rehearing En Banc on the merits, but that is far from clear. Following the grant by this Court of an extension of time to seek *certiorari,* Eastern returned to the Court of Appeals and filed a Petition for Reconsideration of Petition for Rehearing With Suggestion for Rehearing En Banc and a Petition to Recall the judgment issued in lieu of a mandate. The latter Petition was filed because no procedural rule granted Eastern the right to file the Petition for Reconsideration and Eastern believed that without first recalling its mandate the Court of Appeals was without apparent authority to consider the Petition for Reconsideration on its merits. Eastern hoped that the Court of Appeals would recall its mandate, but it did not. It is unclear just what consideration was given to Eastern's Petition for Reconsideration, as the Court of Appeals panel handled the papers and remained silent. Since the panel declined to recall the mandate, the question remains: Did the panel decline the Petition for Reconsideration for lack of jurisdiction?

To further illustrate the uncertainty of the consideration given to this matter, it clearly appears that the panel declined to even circulate the petition to the other members of the Court for their consideration for the highly technical reason that the Petition was "untimely". Was this in keeping with fundamental concepts of fair play under the circumstances since the Petition was not filed under the rule upon which the panel relied? The

Berkeley Inn decision was not known to Eastern until long after the time provided to Petition for Rehearing. Was the panel aware of the decision? In complete fairness, should not the entire Court have had the opportunity to decide whether rehearing should have been granted?

III. CONCLUSION

The Court of Appeals has breached its duty to give appropriate respect to the District Court's determination of the law of Pennsylvania with regard to Eastern's right to trial by jury. The one-sentence footnote statement of the panel's reasoning (Footnote 12, A-14) is far less than adequate to justifiably deny a jury trial without any Pennsylvania authority to support the panel's decision and is clearly erroneous. When *Berkeley Inn* was called to the panel's attention, the minimum standards of fair play and justice required a complete rehearing before the Court En Banc regardless of the absence of a procedural rule.

Respectfully submitted,

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